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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1974

No. 74-82

KITTYHAWK, LTD.,
ESCO DISTRIBUTING CO.

and

MILES FABRICS OF MEMPHIS, INC.,
Petitioners,

v.

CITY OF MIDDLETOWN,
MIDDLETOWN SHOPPING CENTER, INC.

and

MANUEL D. MAYERSON,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF OHIO

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PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF OHIO

The Petitioners, Kittyhawk, Ltd., Esco Distributing Co., and Miles Fabrics of Memphis, Inc., respectfully pray that a writ of certiorari issue to review the judgment and opinion of the Supreme Court of the State of Ohio entered in this proceeding on May 10, 1974.

OPINIONS BELOW

The judgment of the Supreme Court of the State of Ohio dismissing the Petitioners' appeal, not yet reported, appears in the Appendix hereto. The opinion of the Court of Appeals, First Appellate District of Ohio, Butler County, Ohio, not yet reported, appears in the Appendix hereto. The decision of the Court of Common Pleas, Butler County, Ohio, not yet reported, appears in the Appendix hereto.

JURISDICTION

The appeal to the Supreme Court of the State of Ohio was dismissed on May 10, 1974, for the reason that no substantial constitutional question existed.[1] This petition was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. § 1257 (3).

QUESTIONS PRESENTED

1. Whether the zoning restriction of the subject property to C-2 uses ("catering primarily to highway-associated demands") when similiarly situated property is not so restricted is a denial of the "equal protection" clause of the Fourteenth Amendment to the United States Constitution.

2. Whether the zoning restriction of the subject property to C-2 uses ("catering primarily to highway-associated demands") is an unreasonable deprivation of property without due process of law in contravention of the Fourteenth Amendment of the United States Constitution.

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[1] Because of this language, the dismissal is a reviewable order. *Matthews* v. *Huwe*, 269 U.S. 262 (1925); *Tumey* v. *Ohio*, 273 U.S. 510 (1927); *Burns* v. *Ohio*, 360 U.S. 252 (1959).

3. Whether the City's actions in issuing a certificate of zoning compliance and an original and amended building permits conferred such significant property rights upon the Petitioners that the due process clause of the Fourteenth Amendment requires that the theory of estoppel should be imposed upon the City.

CONSTITUTIONAL PROVISIONS AND ORDINANCES INVOLVED

United States Constitution, Fourteenth Amendment:

> "Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

City of Middletown, Ohio, Zoning Ordinance:

> Chapter 1139, "C-1" Convenience Commercial District (Appears in Appendix hereto)
>
> Chapter 1141, "C-2" Roadside Commercial District (Appears in Appendix hereto)
>
> Chapter 1143, "C-3" Community Commercial District (Appears in Appendix hereto)
>
> Chapter 1173, Administration & Enforcement (Appears in Appendix hereto)

STATEMENT OF THE CASE

Petitioner, Kittyhawk, Ltd., an Ohio partnership, purchased in early 1972 approximately 14 acres in the City

of Middletown, Ohio. On July 5, 1972, a certificate of zoning compliance was issued to Petitioner, Kittyhawk, Ltd. Under Section 1173.03 of the Middletown Zoning Ordinance, a building permit can be issued only after a certificate of zoning compliance has been obtained which, under the same section, can be issued only after the intended *uses* conform to the zoning ordinance. The intended uses by the Petitioner were included in the plans submitted to the City's zoning administrator.[2] Four building permits were issued, (each specifying the proposed uses), and construction commenced.

On August 9, 1972, when construction of the building was 55% complete, Kittyhawk, Ltd. obtained an amended building permit which combined two of the originally proposed units into one new proposed use. The commissioner of inspection was apprised of the revised intended use and issued the amended building permit without requiring Petitioner to resubmit the plans to the zoning administrator.

Thereafter, on October 17, 1972, when the three leases were executed[3] and construction nearly 90% complete, the Petitioner received a letter from the City declaring that the proposed uses were not permitted in a C-2 zone.

On October 25, 1972, the City of Middletown filed an action seeking a permanent injunction prohibiting the

---

[2] It should be noted that Section 1141.02 of Zoning Ordinance permits in a C-2 district any additional business which is "of the same general character" as the specifically permitted uses. The property was located in a C-2 zoning classification area ("catering to highway-associated demands").

[3] Petitioners Esco Distributing Co. and Miles Fabrics of Memphis, Inc. are lessees of Petitioner Kittyhawk, Ltd. The uses by the third lessee have not been challenged by Respondents. Hereinafter, unless expressly stated otherwise, "Petitioner" shall refer to Kittyhawk, Ltd.

use of Petitioner's premises as a retail discount and catalog store and as a retail fabric store. The hearing on the injunction commenced on November 2, 1972, before Judge Cramer, Court of Common Pleas, Butler County, Ohio. During the hearing, Middletown Shopping Center, Inc. and Manuel D. Mayerson were permitted to appear as Intervenors on behalf of the City of Middletown.

At the hearing, Petitioners challenged the validity of the Middletown zoning ordinance because, *inter alia*: (1) the C-2 restriction imposed on its property was (a) unreasonable, confiscatory and a denial of due process of law and (b) was unreasonable and a denial of equal protection of the law since similarly situated property was not so restricted; (2) the City should be estopped from pursuing an injunction because of its employees' action in issuing a certificate of zoning compliance and the requisite building permits.

The equal protection assertion was directed at Petitioner's position vis-a-vis that of Middletown Shopping Center, Inc., which was adamently opposing the Petitioner's intended uses. The illustration (p. 6) suggests the Petitioner's property (outlined in heavy black line) within the C-2 zone and the adjoining C-3 zone in which Middletown Shopping Center conducts its operations.

The Petitioner asserted the constitutional questions in the pleadings before the trial court, before the Court of Appeals, and before the Supreme Court of the State of Ohio.

The Petitioner's contentions were well taken by the trial court which, therefore, dissolved the temporary restraining order and denied the motion for a permanent injunction, holding:

> "We do find after what we believe to be a full and fair consideration of all the evidence that the C-2

C-3
ZONE
MIDDLETOWN
SHOPPING
CENTER
N
GRAND AVENUE
ZONE
LINE
BREIEL BLVD
C-2
ZONE
C-2
ZONE
LEWIS
PETITIONERS

> restriction of the defendants' property to C-2 uses is unreasonable, discriminatory and constitutes a denial of equal protection of law. We further find that the Zoning Ordinance, in so far as it attempts to distinquish between C-2 and C-3 uses affecting the premises here in question, is not designed to nor does it promote or have any relation to the public health, safety, morals and general welfare and is, therefore, void as to controlling or in any manner affecting the defendants' use of the property here in issue."

Notwithstanding the Petitioner's continued assertion that the purported zoning classifications would deprive them of property without due process of law and constituted a denial of equal protection, the Court of Appeals, First Appellate District of Ohio, Butler County, Ohio, reversed the order of the trial court and held, in essence, that the zoning classifications in themselves and as applied were valid and, accordingly, no constitutional violations were present. The Supreme Court of the State of Ohio overruled a motion to certify the record and dismissed the appeal, concluding that no substantial constitutional question existed.

REASONS FOR GRANTING THE WRIT

1. THE DECISION BELOW CONFLICTS IN PRINCIPLE WITH THE DECISION OF EUCLID v. AMBLER REALTY CO., 272 U.S. 365 (1926), AS TO THE PROPER INTERPRETATION OF THE CONSTITUTIONALITY OF A MUNICIPAL ZONING ORDINANCE AND, THEREFORE, HAS DEPRIVED PETITIONER OF LIBERTY AND PROPERTY WITHOUT DUE PROCESS OF LAW OR JUST COMPENSATION.

The Petitioner recognizes, of course, the necessity and propriety for a municipality to promulgate a zoning ordinance to safeguard the public health, safety, morals and general welfare of the public.

However, the ordinance must be reasonable in itself and must be reasonable as applied to the subject property before it can withstand constitutional scrutiny. *Nectow* v. *Cambridge*, 277 U.S. 183 (1928); *Loesch Allotment Co.* v. *Newburgh Heights*, 100 N.E.2d 543 (C.P. Cuyahoga County 1950).

Further, the Petitioner does not challenge this Honorable Court's pronouncement in *Euclid* v. *Ambler Realty Co.*, 272 U.S. 365, 389 (1926), that if "the validity of the legislative classification for zoning purposes be fairly debatable, the legislative judgment must be allowed to control." *See also Radice* v. *New York*, 264 U.S. 292 (1924).

But, if there can be no reasonable "fairly debatable" question as to the zoning ordinance itself or as it is applied to the subject property, then it is erroneous to uphold the

zoning ordinance and, since that type of decision is "not in accord with applicable decisions of this court", consideration and review by this Honorable Court is appropriate. Rule 19, *Rules of the Supreme Court of the United States.*

In the instant case, the Petitioner challenges the reasonableness of the zoning ordinance itself. The zoning ordinance purports to distinguish between the C-2 uses and the C-3 zones by asserting that C-2 uses shall cater "primarily to highway-associated demands" while C-3 uses may have uses providing "both convenience goods and major shopping needs for the entire city or a major portion thereof." The Petitioner reasserts its argument that the C-2 and C-3 zoning chapters purport to distinguish between uses when *no difference* exists which can be said to be reasonably related to the objects of the legislation. In reviewing the uses first permitted in each of the two zoning districts, which are fully set out in the Appendix hereto, it is quite clear that the uses specified therein cannot be reasonably distinguished as to "highway-associated demands" and as to "convenience goods . . . for the entire city." On the contrary, all the uses denoted in those two chapters just as easily can be described as "catering to "highway-associated demands" as they can be described as providing "convenience goods for the entire city." There simply is no valid justification for the different treatment accorded these zoning districts. Instead, the classification is invidious, arbitrary and unreasonable.

> "Unreasonable discrimination in the classification of uses and restrictions under zoning is unconstitutional and void. It violates both equal protection and due process of law. Invidious distinctions and discriminations are prohibited. A zoning ordinance is invalid where the restrictions create a monopoly.

> "The classification cannot prohibit or restrict certain uses and permit or not restrict other uses where there is no valid basis, reasonably related to the public health, safety, morals, welfare or other object of the police power, for distinguishing between them." 8 McQuillan, Municipal Corporations 203 (3rd Ed.).

Accordingly, the Petitioner submits that the instant zoning ordinance, in and of itself, must fall because there can be no rational "fairly debatable" questions as to the purported reasonableness of the classification distinctions between C-2 uses and C-3 uses.[4]

Even assuming, *arguendo*, that a reasonable distinction can be drawn within the four corners of the ordinance, there can be no doubt that, as *applied* to Petitioner's property, the ordinance is arbitrary, capricious, unreasonable and not "fairly debatable;" hence, it is in conflict with *Euclid* v. *Ambler Realty Co., supra*, and must fall. *Nectow* v. *Cambridge, supra.*

As the illustration herein reflects, the Petitioner's property is in a C-2 zoning area, *i.e.*, one which caters primarily to "highway-associated demands." Yet, as the illustration also reflects, Petitioner's property has no "highway" frontage. Its only access to Breiel Boulevard is from Lewis Street which is a 214 foot stub road that, as the record suggests, may not even be a dedicated street.[5]

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[4] The City and the Intervenors have throughout this litigation placed substantial reliance on their claim that the zoning ordinance was *comprehensive* and, therefore, it is not assailable. The Petitioner suggests that their argument is a *non sequitur* and thus their reliance is misplaced. A *comprehensive* plan means simply that the zoning ordinance applies to the entire city; it is no independent justification for its internal validity. Haar, *"In Accordance with a Comprehensive Plan,"* 68 Harv. L. Rev. 1154 (1955). *See also* Babcock, The Zoning Game 115-125 (1966); *Henle* v. *Euclid*, 97 Ohio App. 258, 125 N.E. 2d 355, *aff'd mem.*, 62 Ohio St. 280, 122 N.E.2d 792 (1954).

[5] The record and exhibits thereto suggest that there are no curb

No one can seriously claim that a property, having no frontage access to a major thoroughfare, can reasonably be restricted to "highway-associated" uses. The capriciousness of that result is so patent that reasonable minds could not differ and, therefore, the issue cannot be "fairly debatable."

Thus, the Petitioner's land is restricted to "highway-associated demands;" yet the Petitioner has no highway access frontage. Further, the extremely limited uses permitted in a C-2 zone, vis-a-vis those in a C-3 zone, have effectively confiscated the Petitioner's property rights and deprived Petitioner of its basic liberty to develop its property in a manner which could be reasonably related to the public health, safety, morals and welfare of the general public. *See generally, Euclid* v. *Ambler Realty Co., supra; Berman* v. *Parker,* 348 U.S. 26 (1954); *Belle Terre* v. *Boraas,* 94 S. Ct. 1536 (1974).

2. THE PETITIONER IS BEING DEPRIVED OF EQUAL PROTECTION OF THE LAW.

As suggested by the illustration herein and as established by the maps in evidence, the land where the Middletown Shopping Center is situated is zoned C-3 while the immediately abutting zone (in which Petitioner's building is located) having the same frontage on Breiel Boulevard and the same 700 foot depth, and fronting commercial zones across Breiel Boulevard, is restricted and limited to C-2 highway-associated demand uses. The disparity in treatment afforded these two similarly situated areas is readily apparent by comparing the uses permitted in a C-2 zone with the uses permitted in a C-3 zone.

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cuts on Grand Avenue (a major thoroughfare) to either Petitioner's property or Middletown Shopping Center.

The two districts are absolutely alike: they are both zoned commercial; they abut one another; they front to the same extent on the same streets; and, they are adjacent to other commercially zoned properties. There is no reason, reasonably related to the public health, safety, morals or general welfare, why a fabric center is lawful in the Middletown Shopping Center, but prohibited on the other side of Grand Avenue, although the latter premises are also zoned commercial.[6]

It is elementary that a zoning ordinance must operate equally upon all persons and properties which are, with regard to the purpose of the ordinance, similarly circumstanced. If various parcels of real estate are subject to different burdens, or are granted different immunities, such difference in treatment must be founded upon a reason which was a genuine pertinence to the end which the ordinance is designed to attain.

The trial court, in a well-reasoned opinion, considered this point and found as follows:

> "We fail to find any reason which could be said to be reasonably related to the public health, safety, morals and general welfare for distinguishing between the uses permitted in C-2 and C-3 districts where such distinction is based upon 'highway-associated demand.' "

Accordingly, Judge Cramer concluded:

> "We do find after what we believe to be a full and fair consideration of all the evidence that the C-2

[6] It is essential in this case to bear in mind that this matter does not involve encroachment of commerce into residential areas, which so frequently gives rise to zoning litigation. Here, the City has determined that this area, including Petitioner's property, is suitable and appropriate for extensive commercial development, and has zoned the same accordingly.

> restriction of the [Petitioner's] property to C-2 uses is unreasonable, discriminatory and constitutes a denial of equal protection of law."

Therefore, the Petitioner urges that consideration of this "equal protection" issue is appropriate because of its substantial nature and because of the erroneous reversal of the intermediate courts which overturned the findings of the trial court.

3. THE DECISION BELOW RAISES SIGNIFICANT AND RECURRING PROBLEMS CONCERNING WHETHER A CITY'S SUDDEN AND UNEXPLAINED REVERSAL OF POSITION, AFTER SUBSTANTIAL FINANCIAL COMMITMENTS WERE EXPENDED IN RELIANCE ON THE EARLIER POSITION, CONSTITUTES AN ABUSE OF THE EXERCISE OF ITS POLICE POWER IN VIOLATION OF THE FOURTEENTH AMENDMENT.

After the Petitioner had (1) purchased the land, (2) signed substantial architectural and construction contracts, (3) secured from the City a certificate of zoning compliance which can be issued only if the intended uses conform to the zoning ordinance, (4) obtained from the City a building permit and an amended building permit, (5) executed long-term leases, and (6) started construction which was about 90% completed, then, after all of the above, the City filed an injunction seeking to prohibit the intended uses.

As this Honorable Court stated in *Dobbins* v. *Los Angeles*, 195 U.S. 223, 239 (1904):

> "Being the owner of the land and having partially erected the works, the plaintiff in error had acquired property rights, and was entitled to protection against unconstitutional encroachment which would have the effect to deprive her of her property without due process of law."

The Petitioner submits that it falls into the same predicament as existed in *Dobbins* or as existed in *City Railway Co.* v. *Citizens' Street Railroad Co.*, 166 U.S. 557 (1897). Yet both the trial court and the intermediate courts concluded, erroneously it is submitted, that estoppel did not run against the City. The straw upon which the courts relied was Section 1173.02 (a) of the City's Zoning Ordinance which provides in relevant part:

> ". . . Any permit or license issued in conflict with the provisions of this Zoning Ordinance, shall be null and void and of no effect whatever."

The Petitioner suggests that it is fundamentally unfair to confer any validity to this Section. If this type of statute is countenanced, the validity of the entire administrative process is dissipated, if not abrogated. Any applicant obtains a permit at his peril, executes leases at his peril, signs financial commitments at his peril, opens for business at his peril, *ad infinitum*. At any later date, the City can renounce its earlier actions, with the concomitant effect of unconstitutionally depriving the applicant of property rights and, perhaps, driving him to financial ruin.

For a city to act as it did is fundamentally unfair and constitutes, as this Honorable Court noted in *Dobbins*, an "arbitrary exercise of the police power which amounts to a taking of property without due process of law and an impairment of property rights protected by the 14th Amendment to the Federal Constitution." 195 U.S. at

241. *See also Evansville* v. *Gaseteria,* 51 F.2d 232 (7th Cir. 1931); *District of Columbia* v. *Cahill,* 54 F.2d 453 (App. D.C. 1931).

Accordingly, because of the nature of the decisions below, the recurring potential of the issue and its general importance, the Petitioner urges the appropriateness of review by this Honorable Court. Note that the Petitioner is not requesting this Honorable Court to act as a zoning board of appeals. *Belle Terre* v. *Boraas,* 94 S. Ct. 1536 (1974) (dissenting opinion). However, the Petitioner is requesting review of a denial and deprivation of a fundamental constitutional right.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Supreme Court of the State of Ohio.

Respectfully submitted,

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APPENDIX

ORDINANCES

CHAPTER 1139

"C-1" Convenience Commercial District

1139.01 Intent.
1139.02 Principal uses permitted.
1139.03 Conditional uses permitted.
1139.04 Accessory uses permitted.
1139.05 Required conditions.
1139.06 Off-Street parking and loading regulations.
1139.07 Height regulations.
1139.08 Lot area and yard requirements.
1139.09 Maximum floor area.

Cross References

Shopping groups — see P. & Z. 1153.02
Office groups — see P. & Z. 1153.03

1139.01 INTENT.

It is the intent of the "C-1" Convenience Commercial District to have low-intensity, enclosed uses providing primarily convenience goods and personal services for persons residing in the adjacent residential areas. (Ord. 4886. Passed 12-27-68.)

1139.02 PRINCIPAL USES PERMITTED.

No structure or land shall be used for any other than one or more of the following commercial or service purposes:

(a) **Retail Sales.** Bakery shops with baking for sale on the premises, beer and wine carryouts, candy shops, delicatessens, drug stores, groceries and markets, ice cream and dairy product stores, magazine and newsstands, meat, fruit and vegetable markets and tobacco shops;

(b) **Personal and Business Services.** Barber and beauty shops, dry cleaning and laundry pick-up stations provided that no cleaning is done on the premises, funeral homes and mortuaries including those with emergency ambulance service, laundromats, professional offices, shoe repair, talent instruction, branch banks and savings and loan institutions, and real estate and insurance offices;

(c) **Eating and Drink Places.** Ice cream parlors and soda fountains, pizza houses, tea rooms, restaurants and lunch rooms, but specifically excluding drive-in restaurants of any type; liquor consumption on the premises; and dancing, live music or entertainment of any kind shall be prohibited;

(d) **Automotive Services.** Service stations and repair, including minor repair only;

(e) **Shopping Groups.** Shopping groups, as set forth in Chapter 1153;

(f) **Other Uses.** Any other retail business or service which is determined by the Planning Commission to be of the same general character as the above permitted uses, except those which are first permitted as a conditional use in this District, or prohibited or first permitted in any other commercial, office or industrial district, or, in the judgment of the Planning Commission would likely be objectionable in a "C-1" District. (Ord. 4886. Passed 12-27-68.)

1139.03 CONDITIONAL USES PERMITTED.

The following uses shall be permitted only if specifically authorized by the Planning Commission in accordance with the procedure set forth in Chapter 1171:

Clubs and Fraternities. Clubs, fraternities, sororities, lodges and meeting places for other similar organizations. (Ord. 4886. Passed 12-27-68.)

1139.04 ACCESSORY USES PERMITTED.

Structures and uses customarily incidental to any of the aforesaid permitted uses and occupying the same lot or tract shall be permitted, including signs which shall be subject to the standards and requirements of Chapter 1165. (Ord. 4886. Passed 12-27-68.)

1139.05 REQUIRED CONDITIONS.

All uses permitted herein shall be subject to the following conditions:

(a) **Enclosure.** All business, services or processing shall be conducted wholly within an enclosed building except for the sale of fuel, lubricants and radiator fluids at service stations, incidental or seasonal sidewalk sales and off-street parking and loading.

(b) **New Merchandise.** Goods for sale shall consist primarily of new merchandise.

(c) **Production for Sale at Retail.** All products produced on the premises, whether primary or incidental, shall be sold at retail primarily on the premises where produced.

(d) **Equipment Installation.** All equipment or machinery, whether hand or power-operated, used in the

servicing of the building or in the processing of goods therein, shall be installed entirely within a building enclosure, and shall be so located, isolated or sound-insulated in such a manner that any noise generated thereby is not audible beyond the limits of the lot or property line where used.

(e) **Performance Standards.** See the requirements of Chapter 1167.

(f) **Hours.** Operation of any use in a "C-1" District shall be prohibited from 11:00 p.m. to 6:00 a.m., if within 500 feet of any "D" District. (Ord. 4886. Passed 12-27-68.)

1139.06 OFF-STREET PARKING AND LOADING REGULATIONS.

Off-street parking and loading spaces shall be provided as required in Chapter 1163. (Ord. 4886. Passed 12-27-68.)

1139.07 HEIGHT REGULATIONS.

No building shall exceed two stories or thirty feet in height, whichever is greater, and no accessory structure shall exceed one story or twenty feet in height, whichever is greater. (Ord. 4886. Passed 12-27-68.)

1139.08 LOT AREA AND YARD REQUIREMENTS.

The following lot area requirements shall apply:

"C-1" Convenience Commercial District

Minimum lot area	5,000 sq. ft.
Front yard setback	25 ft.
Rear yard	25 ft. where adjoining "P" or "D" District; otherwise 15 ft.
Side yards	15 ft. where adjoining "P" or "D" District; otherwise none.

(Ord. 4886. Passed 12-27-68.)

1139.09 MAXIMUM FLOOR AREA.

No single store or use permitted above shall occupy a net retail floor sales area greater than 15,000 square feet. Retail sales floor area shall not include storage or service areas, lavatories, preparation or utility rooms and other such areas not specifically used for the display of merchandise. (Ord. 4886. Passed 12-27-68.)

CHAPTER 1141

"C-2" Roadside Commercial District

1141.01 Intent.
1141.02 Principal uses permitted.
1141.03 Conditional uses permitted.
1141.04 Accessory uses permitted.
1141.05 Required conditions.
1141.06 Off-street parking and loading.
1141.07 Height regulations.
1141.08 Lot area and yard requirements
1141.09 Maximum floor area.

Cross References

Seasonal or sidewalk displays – see P. & Z. 1125.14
Shopping groups – see P. & Z. 1153.02
Office groups – see P. & Z. 1153.03

1141.01 INTENT.

It is the intent of the "C-2" Roadside Commercial District to have low-intensity, open and enclosed uses catering primarily to highway-associated demands. (Ord. 4886. Passed 12-27-68.)

1141.02 PRINCIPAL USES PERMITTED.

No structure or land shall be used for any other than one or more of the following purposes:

(a) **Retail Sales.** Any use permitted in a "C-1" District, building materials, new and used, farm produce stands, farm implements, mobile home sales, nurseries, including greenhouses, trailer sales, beer and wine carryouts, and pottery and souvenir shops;

(b) **Personal and Business Services.** Any use permitted in a "C-1" District, business and professional offices, lawn and garden equipment rental and service, appliance and business machine service, motels, animal clinics and kennels (in accordance with the provisions of Chapter 1165), indoor and outdoor motion picture theaters, post office branches, and short-term or transient mobile home parks or courts;

(c) **Eating and Drinking Places.** Restaurants, bars and cafes, including those where liquor is consumed on the premises and live entertainment and dancing is provided, drive-in restaurants and refreshment stands, truck stops, banquet halls, and private clubs; (Ord. 4886. Passed 12-27-68.)

(d) **Automotive Services.** Automobile service stations, auto and truck repair, auto and truck sales, new and used, convertible top and seat cover shops, auto parts sales, new and used, tire service, vehicle rental and storage, the sale and repair of bicycles and motorcycles and automatic car wash establishments as regulated in Section 1165.12; (Ord. 5531. Passed 7-18-72.)

(e) **Shopping Groups.** Shopping groups as set forth in Chapter 1153;

(f) **Other Uses.** Any other business or service which is determined by the Planning Commission to be of the same general character as the above permitted uses, and not first permitted in a "C-3", "C-4" or "CBD" Commercial District or in any Industrial District. (Ord. 4886. Passed 12-27-68.)

1141.03 CONDITIONAL USES PERMITTED.

Any one of the following uses may be permitted when authorized by the Planning Commission in accordance with the procedures set forth in Chapter 1171:

(a) **Outdoor Advertising.** Outdoor advertising in accordance with the provisions of Chapter 1165;

(b) **Commercial Recreation.** Bowling and billiard establishments; amusement parks, circus or tent show grounds and minature golf courses, located at least 500 feet from any "D" District; race courses of any type, including horse race tracks and stables and tracks for self-propelled vehicles, located at least 1,000 feet from any "D" District; and other facilities of a similar commercial recreational nature;

(c) **Industrial Uses.** Any use principally permitted in an "I-1" District;

(d) **Railroad.** Spur and yard tracks;

(e) **Clubs and Fraternities.** Clubs, fraternities, sororities, lodges and meeting places for similar organizations. (Ord. 4886. Passed 12-27-68.)

1141.04 ACCESSORY USES PERMITTED.

Structures and uses customarily incidental to any of the aforesaid permitted uses and occupying the same lot or tract, including signs which shall be subject to the standards and requirements of Chapter 1165, shall be permitted. (Ord. 4886. Passed 12-27-68.)

1141.05 REQUIRED CONDITIONS.

All uses permitted herein shall be subject to the following conditions:

(a) **Enclosure.** If any business, service, repair, processing, storage or display not conducted wholly within an enclosed building, except for the sale of fuel, lubricants and radiator fluids at service stations, incidental or seasonal sidewalk sales and off-street parking and loading, adjoins

in the rear or on the sides either directly or across an alley any "D" or "P" District, it shall be enclosed by a solid fence or wall at least six feet in height. The premises, including buildings and accessory structures, fences, walls, pavement and landscaping shall be kept in sightly condition and proper repair.

(b) **Production for Sale at Retail.** All products produced on the premises, whether primary or incidental, shall be sold at retail primarily on the premises where produced.

(c) **Equipment Installation.** All equipment or machinery, whether hand or power-operated, used in the servicing of the building or in the processing of goods therein shall be installed entirely within a building or enclosure, and shall be so located, isolated or sound-insulated in such a manner that any noise generated thereby is not audible beyond the limits of the lot or property line where used.

(d) **Performance Standards.** See the requirements of Chapter 1167. (Ord. 4886. Passed 12-27-68.)

1141.06 OFF-STREET PARKING AND LOADING.

Each use shall provide adequate off-street parking and loading facilities in accordance with the provisions of Chapter 1163. (Ord. 4886. Passed 12-27-68.)

1141.07 HEIGHT REGULATIONS.

No principal structure shall exceed three stories or forty-five feet in height, whichever is greater, and no accessory structure shall exceed one story or twenty feet in height, whichever is greater, except as modified by Chapter 1155. (Ord. 4886. Passed 12-27-68.)

1141.08 LOT AREA AND YARD REQUIREMENTS.

The following lot area and yard requirements shall apply:

"C-2" Roadside Commercial District

Minimum lot area	10,000 sq. ft.
Front yard setback	35 ft.
Rear yard	30 ft. when adjacent to any "P" or "D" District; 15 ft. otherwise for utility easement.
Side yard	20 ft. when adjacent to any "P" or "D" District; 10 ft. otherwise for utility easement.

(Ord. 4886. Passed 12-27-68.)

1141.09 MAXIMUM FLOOR AREA.

No single store or use permitted above shall occupy a net retail sales floor area greater than 25,000 square feet. Retail sales floor area shall not include storage or service areas, lavatories, preparation or utility rooms and other such areas not specifically used for the display of merchandise. (Ord. 4886. Passed 12-27-68.)

CHAPTER 1143

"C-3" Community Commercial District

1143.01 Intent.
1143.02 Principal uses permitted.
1143.03 Conditional uses permitted.
1143.04 Accessory uses permitted.
1143.05 Required conditions.
1143.06 Off-street parking and loading regulations.
1143.07 Height regulations.
1143.08 Lot area and yard requirements.

Cross References

Seasonal or sidewalk displays – see P. & Z. 1125.14
Shopping groups – see P. & Z. 1153.02
Office groups – see P. & Z. 1153.03

1143.01 INTENT.

It is the intent of the "C-3" Community Commercial District to have high-intensity enclosed uses providing both convenience goods and major shopping needs for the entire City or a major portion thereof. (Ord. 4886. Passed 12-27-68.)

1143.02 PRINCIPAL USES PERMITTED.

No structure or land shall be used for any other than one or more of the following purposes:

(a) **Retail Sales.** Any principal permitted use in a "C-1" District, antique shops, appliance sales, apparel sales, novelty and gift shops, department stores, discount stores, garden supply stores, hardware and paint stores, music and record shops, shoe stores, mail order houses, furniture

stores, hobby shops, jewelry stores, milinery shops, toy stores, variety stores, florists, excluding greenhouses, sporting foods and package liquor;

(b) **Personal and Business Services.** Any principal permitted use in a "C-1" District, business and professional offices of any size including medical clinics, photography studios, reducing or health salons, power lawn and garden equipment rental and service, appliance service, post office branches and indoor motion picture theaters;

(c) **Eating and Drinking Places.** Any principal permitted use in a "C-1" District, clubs and restaurants including those serving liquor and providing live music and dancing; no drive-in restaurants of any type shall be permitted;

(d) **Commercial Recreation.** Bowling and billiard establishments;

(e) **Automotive Services.** Any conditionally permitted use in a "C-1" District, automatic car wash, seat cover and convertible top sales and installation and auto parts stores;

(f) **Shopping Groups.** Shopping groups, as set forth in Chapter 1153;

(g) **Other Uses.** Any other retail business or service which is determined by the Planning Commission to be of the same general character as the above permitted uses, and which is not first permitted as a conditional use in this District or prohibited or first permitted in any "C-4", "CBD" of "P" District. (Ord. 4886. Passed 12-27-68.)

1143.03 CONDITIONAL USES PERMITTED.

Any one of the following uses may be permitted when authorized by the Planning Commission in accordance with the provisions set forth in Chapter 1171:

Clubs and Fraternities. Clubs, fraternities, sororities, lodges and meeting places for similar organizations. (Ord. 4886. Passed 12-27-68.)

1143.04 ACCESSORY USES PERMITTED.

Structures and uses customarily incidental to any of the aforesaid permitted uses and occupying the same lot or tract, including signs which shall be subject to the standards and requirements of Chapter 1165, shall be permitted. (Ord. 4886. Passed 12-27-68.)

1143.05 REQUIRED CONDITIONS.

All uses permitted herein shall be subject to the following conditions:

(a) **Enclosure.** All business, services or processing shall be conducted wholly within an enclosed building except for the sale of fuel, lubricants and radiator fluids at service stations, incidental or seasonal sidewalk sales, and off-street parking and loading.

(b) **New Merchandise.** Goods for sale shall consist primarily of new merchandise, except for bona fide antiques.

(c) **Production for Sale at Retail.** All products produced on the premises, whether primary or incidental, shall be sold at retail primarily on the premises where produced.

(d) **Equipment Installation.** All equipment or machinery, whether hand or power-operated, used in the servicing of the building or in the processing of goods therein shall be installed entirely within a building or enclosure, and shall be so located, isolated or sound-insulated in such a manner that any noise generated thereby

is not audible beyond the limits of the lot or property line where used.

(e) **Performance Standards.** See the requirements of Chapter 1167.

(f) **Sound.** Outdoor amplifiers for music, advertising or paging shall be located, directed or shielded so as to prevent sound transmission into any "D" or "P" District. (Ord. 4886. Passed 12-27-68.)

1143.06 OFF-STREET PARKING AND LOADING REGULATIONS.

Off-street parking and loading spaces shall be provided as required in Chapter 1163. (Ord. 4886. Passed 12-27-68.)

1143.07 HEIGHT REGULATIONS.

No building shall exceed two stories or thirty feet in height, whichever is greater, and no accessory structure shall exceed one story or twenty feet in height, whichever is greater. (Ord. 4886. Passed 12-27-68.)

1143.08 LOT AREA AND YARD REGUIREMENTS.

The following lot area and yard requirements shall apply:

"C-3" Community Commercial District

Minimum lot area	20,000 sq. ft.
Front yard setback	50 ft.
Rear yard	30ft. when adjacent to any "D" or "P" District; 15 ft. otherwise for utility easement.
Side yard	20 ft. when adjacent to any "D" or "P" District; 10 ft. otherwise for utility easement.

(Ord. 4886. Passed 12-27-68.)

CHAPTER 1173

Administration and Enforcement

1173.01 Zoning Administrator.
1173.02 Enforcement by Zoning Administrator.
1173.03 Certificate of Zoning Compliance.
1173.04 Building permit required.
1173.05 Certificate of Occupancy.
1173.06 Violations of Zoning Ordinance.
1173.07 Penalty.

Cross References

Certificate issuance in a development or modified use – see P. & Z. 1157.05
Certificate issuance for conditional use – see P. & Z. 1171.01(g)
Building permit fees – see BLDG. 1501.06
Driveways – see BLDG. 1506.01 et seq.

1173.01 ZONING ADMINISTRATOR.

The City Manager shall appoint a Zoning Administrator from within the Department of Community Development. (Ord. 4886. Passed 12-27-68.)

1173.02 ENFORCEMENT BY ZONING ADMINISTRATOR.

It shall be the duty of the Zoning Administrator to enforce the regulations of this Zoning Ordinance in accordance with the administrative provisions herein.

(a) **Compliance of Other City Departments.** All departments, officials and public employees of the City vested with the duty or authority to issue permits or licenses shall comply with the provisions of this Zoning Ordinance and

shall issue no permit or license for any use, building or purpose in conflict with the provisions of this Zoning Ordinance. Any permit or license, issued in conflict with the provisions of this Zoning Ordinance, shall be null and void and of no effect whatever; and no utility or other public service shall be provided to any property used in violation of this or any other applicable ordinance of the City.

(b) **Powers and Duties.** The Zoning Administrator shall issue Certificates of Zoning Compliance in accordance with requirements set forth herein, and shall take any other action authorized by this Zoning Ordinance to insure compliance with, or prevent violation of its provisions. (Ord. 4886. Passed 12-27-68.)

1173.03 CERTIFICATE OF ZONING COMPLIANCE.

No land shall be used and no permits for excavation or construction shall be issued by the Commissioner of Inspection, other than alterations or remodeling not affecting the size, character or use of a structure, until a plan showing such intended use and construction of structures or alterations thereof has been submitted to the Zoning Administrator for his review, and a Certificate of Zoning Compliance issued. Such Certificate shall show that the proposed building or premises, or parts thereof, and the proposed use thereof, are in conformance with all provisions of this Zoning Ordinance.

(a) **Procedure for Certificate of Zoning Compliance.** To obtain a Certificate of Zoning Compliance, an applicant shall submit plans as required in Section 1173.03(b) to the Office of the Zoning Administrator in such number as may be specified by such Administrator. Within seven calendar days, the Zoning Administrator shall review such plans for conformance in all respects to the Zoning Ordi-

nance, Curb-Cut Ordinance No. 4682 and other applicable ordinances, and shall approve, amend or reject with reasons for rejection stated. If such plans are approved, or approved as amended, certification of zoning compliance shall be affixed thereto and one copy returned to the applicant.

(b) **Plan Requirements.** Plans shall show the exact shape and dimensions of the lot or tract proposed to be built upon based on an actual survey. Such plans shall also show the exact location, size and height of the building or structure to be erected or altered, all building facade elevations, floor plans, and the existing and intended use for each building or part thereof, the number of dwelling units contained in such building, and such other information with regard to the lot or neighboring lots as may be necessary to determine and provide for the enforcement of this Zoning Ordinance. At the request of either the Zoning Administrator or the Commissioner of Inspection, the location of any proposed building or structure, or part thereof, shall be staked out on the ground before any Certificate of Zoning Compliance or Building Permit is issued. (Ord. 4886. Passed 12-27-68.)

1173.04 BUILDING PERMIT REQUIRED.

No building or other structure shall be erected, moved or added to, or structurally altered without a permit therefor, issued by the Commissioner of Inspection. No building permit shall be issued unless the proposed plans are in conformity with the provisions of the Zoning Ordinance as attested to by the attachment of a Certificate of Zoning Compliance.

(a) **Procedure for Building Permit.** To obtain a building permit, an applicant shall submit the Certificate of

Zoning Compilance and copies of proposed plans to the Commissioner of Inspection in such number and detail as may be specified by the Commissioner of Inspection.

(b) **Action by Commissioner of Inspection.** Within thirty calendar days from acceptance of plans for review, the Commissioner of Inspection shall review such plans for conformance with all provisions of the Building Code and approve, approve with amendments or refuse to approve with reasons for such refusal so stated. If plans are approved, building permits for construction in conformance with such plans shall be issued upon payment of appropriate fees. (Ord. 4886. Passed 12-27-68.)

1173.05 CERTIFICATE OF OCCUPANCY.

It shall be unlawful to use or occupy or permit the use or occupancy of any building or premises or part thereof, hereafter created, erected, changed, converted or enlarged wholly or in part, in its use or structure until a Certificate of Occupancy has been issued by the Commissioner of Inspection. Such Certificate shall only be issued after the final construction inspection has been conducted and all water, sanitary, electrical and/or heating systems are determined by the Commissioner of Inspection to be operable. A copy of the Certificate of Occupancy shall be forwarded to the Zoning Administrator upon issuance to the applicant.

A temporary Certificate of Occupancy may be issued by the Commissioner of Inspection for a period not exceeding twelve months during alterations, for partial occupancy of a building pending its completion, provided that such temporary Certificate may require such conditions and safeguards as will protect the safety of the occupants and the public. In no case shall such a temporary

Certificate be issued for a new structure. (Ord. 4886. Passed 12-27-68.)

1173.06 VIOLATIONS OF ZONING ORDINANCES.

(a) **Action of Zoning Administrator.** If the Zoning Administrator finds that any provisions of this Zoning Ordinance are being violated, he shall notify in writing the person responsible for such violations, indicating the nature of such violations and ordering the action necessary to provide compliance with this Zoning Ordinance.

(b) **Violator to Conform.** Any person determined to be in violation of this Zoning Ordinance shall take necessary action to bring the violation into compliance within a period of thirty days after the date of written notification by the Zoning Administrator, and such violation shall be corrected within ninety days of such notice. In any instance where the violation is not brought into conformance within the time provided set forth herein, it shall be the duty of the Zoning Administrator to request legal action as provided in Section 1173.06(c).

(c) **Action of Director of Law.** In case any building or structure is, or is intended to be erected, constructed, reconstructed, altered or converted, or any building, structure or premises is, or is intended to be used in violation of, or contrary to the provisions of this Zoning Ordinance, the Director of Law shall, promptly upon a violation of this Zoning Ordinance, institute injunction or other appropriate action to prevent or enjoin construction, reconstruction, alteration, conversion, maintenance or use. Such action may be instituted by the owner of any contiguous or neighboring property as provided in Ohio R.C. 713.13. (Ord. 4886. Passed 12-27-68.)

1173.07 PENALTY.

Whoever violates, disobeys, omits, neglects or refuses to comply with any of the provisions of the Zoning Ordinance shall be fined not more than one hundred dollars ($100.00) for each violation. Each and every day that a violation continues shall constitute a separate offense. (Ord. 4886. Passed 12-27-68.)

COURT OF COMMON PLEAS
BUTLER COUNTY, OHIO

No. CV82-10-0677

CITY OF MIDDLETOWN, OHIO,
Plaintiff,

vs.

KITTYHAWK, LTD.,
a limited partnership, et al.,
Defendants.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND OPINION

November 28, 1972

CRAMER, J.

This cause is now before the Court for final disposition upon the merits, it having been submitted upon the evidence, memoranda and oral arguments of counsel.

This somewhat brief opinion – considering the complex and difficult legal questions involved in this case – is by no means to be taken as a measure – for it is not – of the vast amount of time spent in considering the evidence, in studying memoranda, oral arguments and in researching the authorities cited and independently found by the Court which in any manner assisted us in resolving the issues presented.

The brevity results from our desire to record the Court's decision and finding as quickly as possible. A citation of

the numerous authorities consulted and considered and lengthy quotations therefrom are therefore purposely omitted.

Briefly stated, we find the facts to be as follows: Kitty-hawk, Ltd., one of the defendants herein and the owner of the real estate in question, hereinafter referred to as the owner, had prepared and submitted detailed plans for the building of a commercial structure on part of lot 13118 in the City of Middletown, Butler County, Ohio, to the Zoning Administrator of the City of Middletown, on July 5, 1972. The owner sought to obtain a Certificate of Zoning Compliance — a prerequisite to the issuance of a building permit. The plans called for a building which would house a supermarket, drug store, a fabric center and a tile and carpet store. On the same day an instrument designated a Certificate of Zoning Compliance was issued.

Such Certificate stated the proposed use of the building as "Commercial Shopping Center" and thereon is stated that the "proposed use is principally permitted and that the general land use plan is not in conflict with plans and ordinances." It is also certified therein that the plans submitted were received and "found to be in conformance with the Zoning Ordinance in all respects."

Such certificate was issued in compliance with Sect. 1173.03 of the Zoning Ordinance. The property of the owner is in a C-2 Zone (Roadside Commercial District) which, under Sect. 1141.01 of the Ordinance is confined to "low intensity, open and enclosed uses catering primarily to highway-associated demands."

The building plans first approved had thereon the names of an A & P store, drug store, fabric shop and a tile and carpet store. Later, the owner obtained approval of amended building plans which showed space for Esco Distributing Company (one of the defendants herein), an A & P store,

and a fabric shop. The drug store and the tile and carpet store had been deleted from the plans. The amended plans were approved by the Commissioner of Inspection without any further certificate of zoning compliance and building permits for those stores issued.

Thereafter, the owner contracted for the construction of the buildings. Construction commenced and leases were entered into with lessees involving very substantial rentals running into thousands of dollars. On October 27, 1972, when the building was approximately 90 percent completed according to plans, the City of Middletown, Ohio, brought this action wherein it seeks to permanently enjoin the use of said building by the owner and two of the lessees — namely, the Esco Company which intends to operate a retail sales and catalogue store and the Mills Fabrics of Memphis, Tenn., which intends to operate a fabric shop or center.

The injunction is sought by the City of Middletown and the intervening plaintiffs on the ground that the lessees will be engaging in uses in the operation of their respective businesses which are prohibited in the C-2 zone in which they are situated. It being claimed that such uses under the Zoning Ordinance are permitted only in a C-3 zone (Community Commercial District) a C-4 zone (General Commercial District) or a CB-D zone (Central Business District) as defined in the Ordinance.

The defendants assert that the relief against them being sought must be denied because:

(1) The City is estopped from enjoining the proposed uses of the owner's building.

(2) The proposed uses by the defendants do not violate C-2 zoning.

(3) The restriction of defendants' property to C-2 uses is unreasonable and is a denial of equal protection of the law in that similarly situated property is not so restricted.

(4) The Middletown Ordinance in so far as it attempts to distinguish between C-2 and C-3 uses is void, as such distinction is unreasonable and discriminatory and there is no plausible and substantial connection between such distinction and the public interest which the Ordinance is designed to serve.

Based upon the facts hereinbefore recited our conclusions of law are as follow:

Sect. 1173.02 (a) of the Zoning Ordinance provides that "any permit or license, issued in conflict with the provisions of this Zoning Ordinance shall be null and void and of no effect whatever. . . ."

Therefore, even if we were to assume that the Certificate of Zoning Compliance and the building permits were granted for the uses intended by defendants, still the acts of the City officials who committed them would be invalidated by virtue of the Ordinance.

Furthermore, though a municipality may in some instances be estopped by the act of its officers if done within the scope of and in the course of their employment, estoppel does not arise if the acts done are in violation of law.

The doctrine of estoppel is applicable to municipal corporations where they have the power to act or contract, but is not applicable where the subject matter of the contract is ultra vires, illegal or malum prohibitum. See annotation in Vol. 1 A.L.R. 2d commencing at Pg. 338. Also Vol. 20 O. Jur. 2d Sects. 80 and 81, Pgs. 565 to 569.

The City, in our opinion, is not estopped by reason of any of the acts of its officials, as claimed by the defendants.

It is claimed that the proposed retail sales and catalogue store and fabric center are not incompatible with the C-2 district in which the premises here in question are located.

Sect. 1141.01 of the Ordinance provides that C-2 uses are those "catering primarily to highway-associated demands." The Ordinance then sets forth a number of specific uses which are deemed to come within the intent clause which is found in 1141.01. In Sect. 1141.02 (a) it is provided, under "Retail Sales" that any use is permitted which is allowed in a C-1 district. Thus, a rather substantial overlapping of the kind of goods and articles which may be sold at retail in a C-2 district occurs in respect to the kind of goods and articles which are first permitted in a C-3 zone.

However, we do not consider this situation in and of itself sufficient to permit defendants to use their premises from which to conduct retail sales, which can be construed to be in violation of C-2 zoning. We will, however, consider the evidence in this respect in connection with our determination of whether the restriction imposed by C-2 zoning upon the defendants' premises is discriminatory, arbitrary or unreasonable, bearing in mind that ordinances which impose restrictions upon the use of private property will be strictly construed and their scope is not to be extended to include limitations not therein clearly prescribed.

It is to be noted that under Sect. 1139.02 of the Ordinance many uses for commercial or service purposes are set forth which are permitted in the C-1 zone. Such uses are, of course, permitted in a C-2 zone producing thereby, in a number of instances, not only overlapping but also duplications.

The evidence shows that the land where the Middletown Shopping Center is situated is zoned C-3, Community Commercial District, while the abutting zone where de-

fendants' building is located is restricted and limited to C-2, Roadside Commercial Uses. These two areas are to a great extent given considerably different zoning treatment under the Ordinance.

Our question is whether such difference is reasonably related to the public health, safety, morals or general welfare.

We recognize, of course, that the City Commission of the City of Middletown, Ohio, the legislative authority of that city, is charged with the duty of determining the wisdom of zoning regulations and our judicial judgment is not to be substituted for the legislative judgment in any case in which the issue or matter is fairly debatable.

As hereinbefore stated, the two zoning areas C-2 and 3 are given very substantially different zoning treatment under the Ordinance. However, they bear substantial similarities.

The defendants' property fronts approximately 1100 feet on South Breiel Boulevard and 700 feet on Grand Avenue. The land west of Breiel Boulevard is zoned C-1 Convenience Commercial District, and C-2 Roadside Commercial District. To the south, the land is Roadside Commercial C-2 District and D-3, Medium Density Dwelling District and to the east, the adjacent property zoned D-4, High Density Dwelling.

The Middletown Shopping Center (C-3) abuts defendants' property on the north and has apparently the same frontage on Breiel Boulevard as the property on which defendants' building is located, and the same depth fronting approximately 700 feet on Grand Avenue. This faces C-1 and C-2 Districts across Breiel Boulevard though the residential district to the north and east are more restrictive being D-2, Low Density Dwelling District.

In other words, both these districts are zoned commercial, they abut each other, front to the same extent on the same streets and are adjacent to other commercially zoned properties.

However, the police power of a municipality exercised to regulate the use of land by the enactment of zoning ordinances must be exercised to promote the public health, safety, morals and general welfare. Also, in considering the validity of zoning regulations in their application to the use of the property affected, the courts must consider their reasonableness, since the zoning power does not extend to unreasonable or arbitrary interference with private property rights.

Zoning laws must be impartially applied as to all properties which are similarly situated.

If no benefit results to the public health, safety, morals or general welfare by prohibiting the proposed use of defendants' commercial property while permitting such or similar uses on adjacent commercial property then such prohibitory ordinance is void as being unreasonable, discriminatory, and further is in violation of their Constitutional right to equal protection of the law.

Of course, a municipality is not permitted under the guise of regulating business and segregating it to a particular district to regulate competition or to grant a monopoly to business establishments.

We fail to find any reason which could be said to be reasonably related to the public health, safety, morals and general welfare for distinguishing between the uses permitted in C-2 and C-3 districts wheer such distinction is based upon "highway associated demands."

In McQuillan on Municipal Corporations, 3rd edition, Vol. 8, Pg. 203, we find this statement:

> "The classification cannot prohibit or restrict certain uses and permit or not restrict other uses where there is no valid basis, reasonably related to the public health, safety, morals, welfare or other proper object of the police power and distinguish between them."

In other words, where a restriction is imposed upon one piece of property, as here, and not upon another piece (Middletown Shopping Center), the difference in treatment must be based upon a real and substantial relation to the ends sought by the imposition of the restriction.

The equal protection clause of the Fourteenth Amendment of the Federal Constitution requires that legislative classification be reasonable and not arbitrary and rest upon some ground of difference for a fair and substantial relation to object of legislation so that all persons similarly circumstanced shal be treated alike.

It is our opinion that the defendants may raise questions of whether the zoning restrictions affecting the use of their property are violative of their Constitutional rights without first resorting to or exhausting any administrative remedies provided either by the Ordinance itself or the law. The defendants claim that the Ordinance as it affects their property is unreasonable, confiscatory and denies them their Constitutional rights of due process of and equal protection of the law. This constitutes a proper and direct defense to the claim made by the plaintiff herein and, as such, is properly before this Court. The defendants seek no relief. It is the City of Middletown which seeks it. The defendants are not called upon to resort to any administrative relief such as appeal to a Board of Zoning Appeals or any other similar tribunal.

Under the Ordinance apparently the interpretation of what is meant by "highway-associated demands" is left to

an official such as the Zoning Administrator. No guidelines are set forth to direct him. Specifically setting forth the uses permitted in a C-2 zone, in our opinion, is not sufficient to constitute such guidelines.

Nowhere in the Ordinance is "highway-associated demands" specifically defined. However, many of the principal uses permitted under Sect. 1141.02 (C-2 District) under Retail Sales: personal and business services, eating and drinking places, automotive services, particularly considering that uses provided in C-1 areas as set forth in Sec. 1139.02 of the Ordinance have the effect of permitting uses that are a far cry from what one would ordinarily consider highway-associated demands.

It is also to be noted that Sect. 1141.02 Par. (3) permits premises in C-2 districts to be used in "shopping groups" as set forth in Chapter 1153. In 1153.02 (b) it is provided that any number of commercial structures may be placed on one or more tracts and any number of shops may be permitted in a single structure, with the approval of the Planning Commission. Even though this particular section states that no use shall be approved which is not permitted in the district wherein the project lies, nevertheless, in our opinion, this provision serves considerably to dilute substantially the meaning of highway-associated demands.

The foregoing provisions of the Ordinance herein referred to give the appearance that the zoning power of the City was being exercised from an arbitrary desire to resist the natural operation of economic laws which, of course, is prohibited.

We have the greatest difficulty in finding and, therefore, cannot and do not find that the uses permitted by virtue of the various sections of the Ordinance herein-

before referred to have the effect of prohibiting the uses these defendants expect to make of the structure here in question because they do not "cater primarily to highway-associated demands."

One of the prime requisites of an ordinance such as this is certainty, and a particular zoning enactment or provision thereof can be judicially declared to be inoperative and void for uncertainty, vagueness or indefiniteness. See Vol. 58, Am. Jur. Sect. 24, Zoning. To say the least, taking the applicable provisions of this Ordinance by their four corners, the term "highway-associated demands" in our opinion, is not only uncertain but vague and indefinite. We do not have here presented by the evidence such certainty or definiteness which must appear before the intended uses of these premises by these defendants are to be prohibited.

We do find after what we believe to be a full and fair consideration of all the evidence that the C-2 restriction of the defendants' property to C-2 uses is unreasonable, discriminatory and constitutes a denial of equal protection of law. We further find that the Zoning Ordinance, in so far as it attempts to distinguish between C-2 and C-3 uses affecting the premises here in question, is not designed to nor does it promote or have any relation to the public health, safety, morals and general welfare and is, therefore, void as to controlling or in any manner affecting the defendants' use of the property here in issue.

The relief sought and prayed for by the plaintiffs will be denied. The temporary restraining order and preliminary injunction heretofore issued by this Court will, of course, therefore be dissolved.

This opinion, findings of fact and conclusions of law were this day, November 28, 1972, journalized in the of-

fice of the Clerk of Courts, Butler County, Ohio, and copies thereof mailed to counsel.

.....
Judge

cc:

JEROME GOLDMAN
MR. JOHN R. KOVERMAN, JR.
MR. BARRY LEVY
GEORGE ELLIOTT
TILMON ELLISON

IN THE COURT OF APPEALS
FIRST APPELLATE DISTRICT OF OHIO
BUTLER COUNTY, OHIO

NO. CA 72-12-0080

CITY OF MIDDLETOWN,

Plaintiff-Appellant,

and

MIDDLETOWN SHOPPING CENTER, INC.

and

MANUEL D. MAYERSON,

Appellants-Intervenors,

vs.

KITTYHAWK, LTD.,
ESCO DISTRIBUTION CO.,

and

MILES FABRICS OF MEMPHIS, INC.,

Defendants-Appellees.

DECISION

(Filed January 21, 1974)

Mr. Tilmon A. Ellison, 2114 Central Avenue, Middletown, Ohio 45042, for Plaintiff-Appellant,

Messrs. Jerome Goldman, 911 First National Bank Building, Cincinnati, Ohio 45202, and C. Richard Greathouse, Jr., 207-8 Savings & Loan Building, Middletown, Ohio 45042, for Appellants-Intervenors,

Messrs. George H. Elliott, 1601 First Avenue, Middletown, Ohio 45042; Barry J. Levey, 403 First National

Bank Building, Middletown, Ohio 45042; and John R. Koverman, Jr., 843 Third National Building, Dayton, Ohio 45402, for Defendants-Appellees.

PER CURIAM.

This cause came on to be heard on an appeal on questions of law, transcript of the docket and journal entries and original papers from the Court of Common Pleas, Butler County, transcript of the proceedings, assignments of error, briefs and arguments of counsel.

On July 5, 1972, Kittyhawk, Ltd., one of the appellees herein and owner of the subject real estate, submitted to the zoning administrator of the appellant, City of Middletown, hereinafter referred to as City, detailed plans for the building of a commercial structure on part of Lot No. 13118 in said City. The plans called for a building which would house a supermarket, drug store, fabric center, and a tile and carpet store. Subsequent thereto and on the same date, the zoning administrator issued a Certificate of Zoning Compliance which stated the proposed uses of the subject building as "Commercial Shopping Center" and that the "proposed use is principally permitted and that the general land use plan is not in conflict with plans and ordinances." It was also certified therein that the plans submitted were "found to be in conformance with the Zoning Ordinance in all respects"; however, no particular use was specified therein, as required by Section 1173.03 of the City's zoning ordinance.

Appellee Kittyhawk, Ltd., then presented this Certificate of Zoning Compliance to the City's commissioner of inspection who issued four building permits: one each for the supermarket, drug store, fabric center, and tile and carpet store. Subsequently, the drug store and the tile and carpet store decided not to locate their operation in the subject building.

On July 21, 1972, appellee Kittyhawk, Ltd., entered into a lease with appellee Esco Distributing Company, under which Esco would operate a retail sales and catalog store in the subject building. Amended plans, which combined the two units originally intended for the drug store and the carpet store into one unit to accomodate the proposed Esco Store, were submitted to the commissioner of inspection, who issued a building permit for the plans as amended.

On October 27, 1972, the City filed a complaint in the Court of Common Pleas, Butler County, wherein it sought to permanently enjoin the use of the subject building for a retail sales and catalog store and fabric center. Pursuant to the City's motion, the trial court issued a temporary restraining order on the same date whereby it enjoined and restrained the use of the subject building as a retail discount and catalog mailorder store and as a retail fabric store until said property is rezoned to a zoning classification permitting such uses or until permits are issued by the City Board of Zoning Appeals approving such uses.

On November 2, 1972, appellees filed a motion to vacate the temporary restraining order on the grounds that the City was estopped from enjoining the proposed uses and that the City zoning ordinance, insofar as it purports to prohibit the proposed uses on the subject property, is "unreasonable, arbitrary, confiscatory and constitutes a taking of defendant's property without due process of law and is a denial to defendants of the equal protection of the law, both as guaranteed by the Constitutions of the United States and State of Ohio."

Commencing November 2, 1972, the cause was heard on its merits for a permanent injunction. Thereafter, on November 17, 1972, the trial court permitted Middletown

Shopping Center, Inc., and Manuel D. Mayerson to intervene in said cause.

On November 28, 1972, the trial court ruled that the City was not estopped from enforcing its zoning ordinance, but denied the injunctive relief sought by the City and held that the "C-2 restriction of the defendants' property to C-2 uses is unreasonable, discriminatory, and constitutes a denial of equal protection of the law." The court further held that the zoning ordinance, "insofar as it attempts to distinguish between C-2 and C-3 uses affecting the premises here in question, is not designed to nor does it promote or have any relation to the public health, safety, morals and general welfare and is, therefore, void as to controlling or in any manner affecting the defendants' use of the property here in issue." It is from this judgment that appellant City and appellant-intervenors present this appeal.

Appellants present five assignments of error. Appellants claim in their first assignment of error that "the trial court erred in its findings of fact in that they are not supported by any evidence". Appellants specifically refer to page 7a of the trial court's "Findings of Fact, Conclusions of Law and Opinion" and argue that there was no evidence presented tending to show a "similarity" between the property lying to the north of Grand Avenue which was zoned C-3 and the appellants' property which was zoned C-2. Appellants also contend that the trial court has further misinterpreted the law of zoning in that such a similarity is not a proper justification for requiring that property zoned C-2 be treated the same as property in a C-3 district.

After a thorough review of the record this Court is of the opinion that the trial court's determination that the subject property "fronts approximately 1,110 feet on South Breiel Boulevard and 700 feet on Grand Avenue is not supported by the manifest weight of the evidence. The

exhibits demonstrate that the subject property has no frontage on Breiel Boulevard but has only access to Breiel Boulevard by means of Lewis Street.

Whether a similarity exists between property given substantially different treatment under a city wide comprehensive zoning ordinance is not a proper justification for holding a zoning ordinance invalid as applied to that property. It is clear that where, as in the instant case, limitations are put upon the use of property under a comprehensive city wide zoning ordinance that the districts established thereby must have definite boundaries. Obviously, property abutting upon the boundaries must be affected to some degree by proximity to the boundaries of the zone. Such a situation is inevitable unless the entire community is placed in one unrestricted zone. The courts have consistently refused to interfere with the legislative bodies fixing the boundaries of zones unless the exercise of this function indicates a capricious, arbitrary, and unreasonable action, entirely foreign to any considerations involving the safety, health, morals, or welfare of the community. *Central Trust Co.* v. *Cincinnati,* 62 O. A. 139; also *Zahn* v. *Board of Public Works,* 274 U.S. 325; *Willot* v. *City of Beachwoods,* 175 Ohio St. 557.

Where property is used for business purposes not permitted in the zone where located but consistent with uses permitted in an adjacent zone, the mere fact that such property abuts the other zone is not of itself sufficient basis to sustain a claim that said property be included in the permissible zone. *Central Trust Co.* v. *Cincinnati, supra.* Appellants' first assignment is well taken.

In their second assignment of error appellants contend that "the trial court erred in its findings of fact in that they were not supported by the weight of the evidence

and that the defendants have not clearly shown that the ordinance is unreasonable as to them".

We are of the opinion after examination of the record that the judgment of the trial court was manifestly against the weight of the evidence. Appellees failed to establish that the zoning ordinance as it is applied to the subject property does not bear a real and substantial relation to the public health, safety, morals, or general welfare and that it is therefore unreasonable and arbitrary. Appellants' second assignment is well taken.

Appellants contend in their third assignment that "the trial court erred in applying its own interpretation to the zoning ordinance and finding for defendants when such determination is at least debatable, in which case the determination of the city's legislative body must be sustained". Appellants argue that the trial court "erred in failing to recognize the total comprehensiveness of the plan of the zoning ordinance". Appellants draw attention in their brief to certain findings of fact and conclusions of law made by the trial court which, in their opinion, clearly demonstrate that the trial court failed to scrutinize the total comprehensiveness of the City's zoning ordinance.

After a review of the numerous authorities cited by the parties herein and a careful review of the record, we are in agreement with the arguments presented by appellants. We are also of the opinion that the record clearly establishes that the City's zoning ordinance as applied to the subject property bears a substantial relationship to the public health, safety, morals, and general welfare and that it is reasonable as to said property. Accordingly, we find appellants' third assignment to be well taken.

Appellants contend in assignment four that "the trial court erred in its finding that there are 'no guidelines set

forth' in the zoning ordinance to direct 'the zoning administrator' ".

Section 1141.01 of the City's zoning ordinance does not specify that only highway associated uses are permitted in a C-2 district, but provides that "it is the intent of the C-2 Roadside Commercial District to have low intensity, open and enclosed uses catering primarily to highway associated demands".

Section 1141.02, City Zoning Ordinance, sets forth the specific uses permitted in a C-2 zone and in addition provides in sub-section (f) as follows:

> *"Other Uses.* Any other business or service which is determined by the Planning Commission to be of the same general character as the above permitted uses, and not first permitted in a 'C-3', 'C-4' or 'CBD' Commercial District or in any Industrial District."

We find that the trial court erred in holding that "what is meant by 'highway associated demands' is left to an official such as the zoning administrator" and that "no guidelines are set forth to direct him". A perusal of the entire zoning ordinance leads this Court to the inescapable conclusion that the legislative body which enacted the City's zoning ordinance did not intend the C-2 zone and property included therein to be restricted to uses which are only highway associated uses. Similarly, it is evident that the zoning ordinance read in its entirety provides sufficient guidelines to direct the Planning Commission in its determination as to what other uses are permitted in a C-2 zone. It is, therefore, not necessary that the ordinance specifically define the term "highway associated demands". Appellants' fourth assignment is well taken.

In assignment five the claim is made that "Defendants have administrative remedies under the zoning ordinance

which have not been exhausted and for that reason the trial court erred in permitting them to raise the question of the validity of the ordinance in this case".

Appellants argue in support of this assignment that appellee failed to apply to the Planning Commission, pursuant to Section 1125.17 and Chapter 1171 of the zoning ordinance, for a determination that their proposed use was permissible. Appellants also contend that Chapter 1175 of the zoning ordinance provides for a variance granted by the Board of Zoning Appeals under certain circumstances.

We note that in the instant case appellants' application for a Certificate of Zoning Compliance was granted initially by the zoning administrator; that the evidence is conflicting as to whether the zoning administrator told appellees that their use was not permitted in a C-2 zone; and that the commissioner of inspection initially issued the building permits and later amended said permits. At no time prior to the filing of appellants' Complaint did appellees receive rulings adverse to their position and from which an appeal could have been prosecuted pursuant to Chapter 2506, Ohio Revised Code. Because the required permits were granted, appellees argue that variances were not required and that no determination of the permissability of their uses by the Planning Commission was necessary. Appellants take the position that to permit the appellees to attack the validity of the ordinance in the instant case would render the zoning ordinance useless.

We find that the trial court correctly permitted appellees to raise the issue of the zoning ordinance's validity. The actions of the zoning administrator and commissioner of inspection in issuing to appellees a Certificate of Zoning Compliance and building permits precluded the necessity for any further administrative proceedings as a condition

precedent to attacking the validity of the zoning ordinance. Appellants' fifth assignment is not well taken.

Upon oral argument appellees raised the issue of whether appellant City should be estopped by the actions of its zoning administrator in issuing the Certificate of Zoning Compliance and the actions of its commissioner of inspection in issuing and amending the building permits. It is the conclusion of this Court that the ruling by the trial court that appellant was not estopped from bringing this action to enforce its zoning ordinance was correct. The City is not estopped by the erroneous unauthorized actions of the zoning administrator and commissioner of inspection. 37 Ohio App. 102; see also Section 1173.02 (a), City's Zoning Ordinance.

It is, therefore, the order of this Court that the judgment of the Court of Common Pleas of Butler County, Ohio be, and the same hereby is, reversed and this cause remanded to the Court of Common Pleas for issuance of the requested injunction.

HESS, P. J., and SHANNON, J.
PALMER, J., not participating.

PLEASE NOTE:

The Court has placed of record its own entry in this case on the date of the release of this Decision.

THE SUPREME COURT OF THE STATE OF OHIO

1974 TERM

To wit: May 10, 1974

No. 74-234

THE STATE OF OHIO,

City of Columbus.

CITY OF MIDDLETOWN,

Appellee,

vs.

KITTYHAWK, LTD., ET AL.,

Appellants.

MOTION FOR AN ORDER DIRECTING
THE COURT OF APPEALS
for Butler County
TO CERTIFY ITS RECORD

It is ordered by the Court that this motion is overruled.

COSTS:

Motion Fee, $20.00, paid by Elliott & Boyd.

I, Thomas L. Startzman, Clerk of the Supreme Court of Ohio, certify that the foregoing entry was correctly copied from the Journal of this Court.

Witness my hand and the seal of the Court
this .... day of ..... 19....

..... Clerk

..... Deputy

THE SUPREME COURT OF OHIO

1974 TERM

To wit: May 10, 1974

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THE STATE OF OHIO,

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KITTYHAWK, LTD., ET AL.,

Appellants.

APPEAL FROM THE COURT OF APPEALS
for Butler County

This cause, here on appeal as of right from the Court of Appeals for Butler County, was heard in the manner prescribed by law, and, no motion to dismiss such appeal having been filed, the Court sua sponte dismisses the appeal for the reason that no substantial constitutional question exists herein.

It is further ordered that a copy of this entry be certified to the Clerk of the Court of Appeals for Butler County for entry.

I, Thomas L. Startzman, Clerk of the Supreme Court of Ohio, certify that the foreoing entry was correctly copied from the Journal of this Court.

Witness my hand and the seal of the Court
this ..... day of ..... 19....
..... Clerk
..... Deputy